

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM ALFRED DEGRANDCHAMP,

Defendant-Appellant.

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UNPUBLISHED

January 21, 2003

No. 235549

Oakland Circuit Court

LC No. 01-176307-FH

Before: Cooper, P.J., and Bandstra and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for operating an off road vehicle under the influence of intoxicating liquor causing death (ORV/OUIL causing death), MCL 324.81134(7), operating an ORV while license suspended or revoked, MCL 324.81140a, operating an ORV on a highway, MCL 324.81122, and possession of marijuana, MCL 333.7403(2)(d), entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

At approximately 10:30 p.m. on January 3, 2001, a head-on collision occurred between an ORV operated by defendant and a car driven by Pamela Campbell. Joey Daniels, age twelve, a passenger on the ORV, was thrown from the ORV when the collision occurred and died as a result of the multiple blunt force injuries he sustained when he struck the ground and became pinned under Campbell's vehicle. The collision occurred on a public highway. Witnesses who were at the accident scene testified that defendant was combative and appeared to be intoxicated. Defendant's driver's license was suspended on January 3, 2001. Defendant's blood was drawn some three and one-half hours after the accident occurred. His blood alcohol level was .12%. An accident reconstruction expert determined that defendant's ORV was traveling in excess of the posted speed limit of twenty-five miles per hour when the accident occurred, and that defendant caused the accident. Defendant was advised of his *Miranda*<sup>1</sup> rights, and later was overheard to say that he had been driving the ORV at forty to forty-five miles per hour and that he was intoxicated when the accident occurred. The police confiscated a small bag of marijuana from defendant.

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<sup>1</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Defendant requested that the court instruct the jury on the offense of negligent homicide, MCL 750.324, as a cognate lesser included offense of the charge of ORV/OUIL causing death. The trial court denied defendant's request, concluding that the evidence did not support the giving of an instruction on negligent homicide. The jury found defendant guilty of the charged offenses.

We review a claim of instructional error de novo. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002).

A lesser included offense can be either a necessarily included lesser offense or a cognate lesser included offense. *People v James*, 142 Mich App 225, 227; 369 NW2d 216 (1985). All of the elements of a necessarily included lesser offense are contained within the greater offense. It is impossible to commit the greater offense without also committing the necessarily included lesser offense. A cognate lesser included offense is an allied offense of the same class or category as the greater offense. It has some elements in common with the greater offense, but also has some different elements than the greater offense. *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001). A requested instruction on a necessarily included lesser offense is properly given if the greater offense requires the jury to find a disputed factual element that is not part of the lesser offense and if the evidence supports it. An instruction on a cognate lesser included offense is not permitted. MCL 768.32(1); *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002); *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002).

A person is guilty of the offense of operating a motor vehicle under the influence of intoxicating liquor causing death (OUIL causing death), MCL 257.625(4), if he operated a motor vehicle upon a highway or other area open to the general public while under the influence of intoxicating liquor with a blood alcohol content of .10% or more, and by the operation of the vehicle, caused the death of another person. The person's intoxicated driving must have been a substantial cause of the victim's death. MCL 257.625(4); CJI2d 15.11. OUIL causing death creates an irrebuttable presumption of gross negligence. Once the prosecution establishes that the defendant voluntarily drove while intoxicated, it need not prove further that the defendant's driving was grossly negligent. *People v Lardie*, 452 Mich 231, 251-252; 551 NW2d 656 (1996). The only substantive difference between the statutes creating the offense of OUIL causing death and ORV/OUIL causing death is the reference to an ORV in MCL 324.81134(7). The penalty is the same in each statute.<sup>2</sup>

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<sup>2</sup> MCL 324.81134(7) was enacted by 1998 PA 355, effective October 16, 1998. MCL 324.81134(2) prohibits a person from operating an ORV with a blood alcohol content of .10% or more. Previously, MCL 257.1620a, repealed 1995 PA 58, effective May 24, 1995, also prohibited a person from operating an ORV with a blood alcohol content of .10% or more. A person who operated an ORV on a highway while intoxicated could be charged under either the OUIL statute, MCL 257.625, or MCL 257.1620a. *People v O'Neal*, 198 Mich App 118, 121; 497 NW2d 535 (1993). No case has articulated the specific elements of ORV/OUIL causing death; however, given the history of the provisions it is logical to assume that those elements are the same as the elements of OUIL causing death. Furthermore, it is logical to assume that the irrebuttable presumption of gross negligence that is created by the act of voluntarily driving a motor vehicle while intoxicated, *Lardie, supra*, also is created by the act of voluntarily operating an ORV while intoxicated.

To establish the offense of negligent homicide, the prosecution must show that the defendant operated a motor vehicle in a negligent manner, that the defendant's negligence was a substantial cause of an accident resulting in injuries to the deceased, and that those injuries caused the death of the deceased. CJI2d 16.14. Negligent homicide is premised on an act of ordinary negligence. See *People v Olson*, 181 Mich App 348, 353; 448 NW2d 845 (1989).

Defendant argues that the trial court erred by denying his request for an instruction on negligent homicide as a cognate lesser included offense of ORV/OUIL causing death. He contends that had the jury been instructed on the offense of negligent homicide, it could have concluded that, although his consumption of alcohol did not constitute a substantial cause of Joey's death, his negligent operation of the ORV was a substantial cause of the accident that resulted in Joey's fatal injuries.

We disagree and affirm defendant's convictions. No case has addressed the issue of whether negligent homicide is a cognate lesser included offense of ORV/OUIL causing death. However, we need not reach that issue in order to resolve this case. The giving of an instruction on a cognate lesser included offense is prohibited. *Cornell, supra*; *Reese, supra*.<sup>3</sup> However, even in the absence of this authority, defendant would not be entitled to relief. Prior to those decisions, the law provided that if a defendant admitted to conduct that, as a matter of law, constituted the distinguishing element, an instruction on a cognate lesser included offense was inappropriate. *People v Bailey*, 451 Mich 657, 671; 549 NW2d 325 (1996). The evidence showed that Joey died as a result of injuries he sustained when he was thrown to the ground after the ORV on which he was riding as a passenger collided with a car while both vehicles were on a public highway. Defendant stated that he was operating the ORV at forty to forty-five miles per hour with Joey as a passenger, and that he was intoxicated when the accident occurred. Defendant's statement constituted evidence that he voluntarily operated the ORV while he was intoxicated. That evidence created an irrebuttable presumption of gross negligence, *Lardie, supra*, and constituted proof of the distinguishing element between ORV/OUIL causing death and negligent homicide. Defendant was not entitled to an instruction on the offense of negligent homicide.

Affirmed.

/s/ Jessica R. Cooper  
/s/ Richard A. Bandstra  
/s/ Michael J. Talbot

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<sup>3</sup> Defendant's appeal was pending at the time our Supreme Court decided *Cornell, supra*, and *Reese, supra*; therefore, those decisions are controlling in this case. *Cornell, supra* at 367.